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## VIA ELECTRONIC MAIL

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: **EX PARTE LETTER**  
TracFone Wireless, Inc. Petition for Forbearance, *Federal-State Joint*  
*Board on Universal Service*. CC Docket No. 96-45

Dear Ms. Dortch:

On behalf of our client, TracFone Wireless, Inc., this letter is submitted in response to the ex parte letter filed by the United States Telecom Association (USTelecom) August 17, 2005 in the above-captioned matter.<sup>1</sup>

On June 8, 2004, TracFone petitioned the Commission for forbearance from application of those provisions of the Communications Act and the Commission's rules which require that carriers designated as Eligible Telecommunications Carriers (ETCs) provide service using their own facilities or a combination of their own facilities and resale of other carriers' services (47 U.S.C. § 214(e)(1)(A), 47 C.F.R. § 54.201(i)). Forbearance is necessary for TracFone to be designated an ETC because it provides service entirely on a resale basis. Following issuance of a public notice inviting comment on TracFone's forbearance petition, comments both in support of and in opposition to TracFone's petition were filed with the Commission on or about July 26, 2004, and TracFone submitted a reply to those comments both for and against its petition on August 9, 2004. USTelecom

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<sup>1</sup> USTelecom's letter summarizes points made during an August 16 meeting with Michelle Carey, Legal Advisor to Chairman Kevin J. Martin. TracFone believes that similar meetings were held with members of the staffs of other commissioners and possibly with the Wireline Competition Bureau, and that the same points were made. This letter is responsive to those as well.

did not file comments in response to TracFone's petition! Section 10(c) of the Act provides that petitions for forbearance are deemed granted if not denied within one year of their filing. However, the Commission may extend that one year for an additional 90 days. By order issued February 17, 2005, the Chief, Wireline Competition Bureau, extended the deadline for action on TracFone's petition until September 6, 2005.

Now, a mere 20 days before the expiration of the statutory fifteen month period for action on TracFone's petition and more than a year after the Commission invited comment on the petition, USTelecom, for the first time, expresses its opposition. USTelecom does not demonstrate or even allege that TracFone's petition fails to meet any of the statutory forbearance requirements codified at Section 10. Rather, USTelecom suggests – nearly one and one-quarter years after the petition's filing and on the eve of the statutory deadline for action on the petition– that the Commission first “initiate a rulemaking on a number of procedural and enforcement matters . . . .”

Not only is USTelecom's eleventh hour request for a rulemaking an untimely dilatory tactic, it is not permissible under the Act. The forbearance provisions of Section 10 are not discretionary. They are mandatory. Section 10 requires the Commission to forbear from applying any regulation or provision of the Act to a telecommunications carrier, telecommunications service, or class of telecommunications carriers or telecommunications services if the Commission makes a three-part determination:

1. enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
2. enforcement of such regulation or provision is not necessary for the protection of consumers; and
3. forbearance from applying such provision or regulation is consistent with the public interest.

In making the public interest determination required by no. 3 above, Section 10(b) of the Act obligates the Commission to consider whether the requested forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among telecommunications service providers.

TracFone demonstrated in its petition that each part of that three-part test would be satisfied and that its request for forbearance would enhance competition. In responsive pleadings, TracFone refuted specific arguments which had been made on a timely basis by those who opposed its forbearance request. Once the Commission determines that each prong has been met, it must, as a matter of law, grant the petition. The D.C. Circuit has made clear that the Commission may not deny a forbearance petition which satisfies the Section 10 test on the basis that it will address the same

issues or related issues in another proceeding, such as a rulemaking proceeding. See AT&T Corp. v. FCC, 236 F.3d 729 (D.C. Cir. 2001).

Whether or not the Commission wishes to conduct further proceedings to address aspects of TracFone's plans to implement its Lifeline proposal, the Commission should not – indeed may not – deny a forbearance petition which complies with the standard codified at Section 10. Although none of the “red herring” arguments contained in US Telecom's letter warrant further proceedings, TracFone will address those claims anyway.

First, USTelecom asserts that TracFone has not explained how its prepaid, minutes-based service will be discounted. USTelecom's explanation of this objection is not very clear, but it appears to be suggesting that discounted Lifeline programs provided on a prepaid basis are somehow improper. USTelecom's attention is directed to the Ex Parte Supplement to Petition for Forbearance and Petitions for Designation as an Eligible Telecommunications Carrier filed by TracFone July 15, 2005. In that submission, TracFone explained in detail how its prepaid Lifeline programs will work. Any questions about how minutes discounts will be calculated are answered in that filing. USTelecom's objection seems to be directed at the prepaid nature of TracFone's proposal rather than to the fact that TracFone provides service on a resale basis. It is the fact that TracFone provides service on a resale basis, not the fact that it offers prepaid services, that necessitated the filing of the forbearance petition. USTelecom's letter appears to be a generalized objection to Lifeline services being provided on a prepaid basis, not a Section 10-based challenge to TracFone's petition for forbearance.

US Telecom also claims that information is needed on how the Universal Service Administrative Company will administer reimbursement for Lifeline discounts provided by TracFone. The answer is simple: TracFone will (like all other ETCs) periodically submit to USAC Form 497 with information about the number of Lifeline customers served and the support levels per subscriber. Reimbursement will be based on that information – as is done with every other ETC. (It should be noted that the USAC procedures for reimbursement, including development of Form 497 did not occur until after the Commission established universal service rules. The Commission did not delay implementation of these programs so that new forms could be created).

Next, US Telecom complains that TracFone has not explained how it will verify and re-verify Lifeline customer eligibility, and specifically objects that having retail vendors confirming eligibility is “suspect.” Notwithstanding USTelecom's professed ignorance of TracFone's plans for certification and verification of Lifeline eligibility, those plans were disclosed in detail in TracFone's Plans for Compliance with the Lifeline Certification and Verification Requirements Codified at Section 54.410 of the Commission's Rules, filed July 13, 2005 (“Certification Plan”). TracFone cordially invites USTelecom to review that document and to reconsider its assertion that TracFone has not explained its certification and verification procedures. As described in the Certification Plan, consumers will have the choice of providing eligibility information either at point of sale or directly to TracFone. However, in all cases, fully-trained TracFone employees will confirm the certification data. As TracFone explained in the July 13 filing, *“Whether consumers choose to enroll in TracFone's Lifeline program at the point of sale or by contacting TracFone, all processing of*

*consumers' applications, including review of all application forms will be performed by TracFone personnel under the immediate supervision of managers specially trained in the Lifeline program."*

USTelecom next claims that TracFone has not explained how it will terminate Lifeline minutes already purchased when a customer becomes ineligible. In this regard, TracFone is no different from any other ETC. When a customer of an ETC who happens to be an incumbent wireline local exchange carrier (such as a USTelecom member) loses its Lifeline eligibility, does the ETC suspend the customer's service in mid-month if the customer loses ETC eligibility in mid-month? Of course not. In fact, most ETCs allow Lifeline customers to continue to receive the Lifeline discounts (and to themselves receive support from the Universal Service Fund) until such time as the ETC learns that the customer has lost its Lifeline eligibility -- which could be months later. As described by TracFone in its July 13 Certification Plan, TracFone will require Lifeline customers to verify their continuing Lifeline eligibility annually -- just as other ETCs do. No more is required by the Commission's Rules.

USTelecom's suggestion that monitoring of TracFone's Lifeline program will be difficult because of a "lack of ongoing customer contact with the prepaid customers" is especially curious. As with each of USTelecom's other objections, this objection seems to go the TracFone's prepaid model, not to its resale status, and therefore is not relevant to the forbearance petition. In fact, TracFone will have ongoing contact with its Lifeline customers since the Lifeline programs will be purchased by eligible customers one month at a time.

USTelecom's next assertion regarding confirmation that consumers might not receive the full discount is pure speculation. Throughout this proceeding, TracFone has stated repeatedly that under its Lifeline proposals, one hundred percent of the Universal Service Fund support it receives will be flowed through to Lifeline customers. USTelecom's suggestion that TracFone could resort to "creative pricing" to extract more than customers expect to pay is particularly ironic. Unlike many carriers, including many USTelecom members, TracFone's stated rates are the total rates that its customers pay. When TracFone offers a service at \$0.10 per minute -- customers pay \$0.10 per minute. It does not line its pockets with additional revenues from "regulatory compliance charges," "administrative fees," "government-imposed surcharges," etc., which have impaired the reputation of much of the telecommunications industry and necessitated that the Commission conduct special proceedings into carrier billing practices (see, e.g., Truth-in-Billing Format, et al (Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking), 20 FCC Rcd 6448 (2005)).

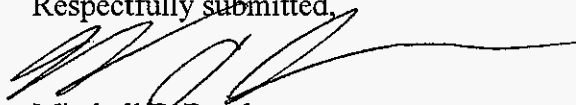
US Telecom asks the Commission to conduct a rulemaking proceeding to address the impact of multiple ETCs, including wireless ETCs, on monitoring and compliance with the objective of Lifeline service. As USTelecom should be aware, the Commission has considered the impact of multiple ETCs in markets, including wireline ETCs in many proceedings involving specific ETC proposals (such as those of Western Wireless, Highland Cellular, Virginia Cellular and others), and recently completed a comprehensive rulemaking proceeding in which it established criteria and requirements for ETC eligibility. (Federal-State Joint Board on Universal Service (Report and Order), 20 FCC Rcd 6371 (2005)). Few, if any issues, have been subject to more Commission

proceedings and greater scrutiny than the impact of multiple ETCs on the Universal Service Fund. At this point, conducting yet another proceeding on that subject would be a waste of resources, and certainly would not warrant further deferral of approval of an otherwise grantable forbearance petition.<sup>2</sup>

As described herein, none of the accusations, arguments or professed fears of USTelecom warrant further delay of TracFone's forbearance petition, even if such delay were permissible which, as discussed above, it is not. During the past fifteen months, TracFone has provided a detailed proposal for bringing affordable, mobile, convenient, wireless service to low income Lifeline-eligible consumers as an ETC. It has answered every objection raised by its opponents and responded to every Commission request for information regarding how its Lifeline program would operate. TracFone petitioned for forbearance and applied for ETC designation because it perceived an unmet need. Today, approximately 96 percent of Universal Service Fund support goes to incumbent wireline local exchange carriers -- many of whom are USTelecom members. Yet, less than thirty-four percent of Lifeline eligible customers participate in Lifeline programs. In some of the states for which TracFone has applied to be an ETC the percentages are far worse (16.1 percent in North Carolina; 13.5 percent in Florida, 8.5 percent in Alabama, 6.6 percent in Virginia, 6.4 percent in Tennessee). Given where nearly all of the USF funding goes today and the low participation in Lifeline, there can be only one conclusion: the current recipients of that funding have failed miserably to reach out to low income residents in their communities to make available assistance through the federal Lifeline program. TracFone is a company whose entire business model is built on providing on a prepaid basis affordable wireless service to low income, low volume consumers. It believes that, if given a chance, it can do what most ETCs today have failed to do: increase participation in the Lifeline program among those that the program is intended to benefit. Nothing in USTelecom's August 17 ex parte letter warrants denial of TracFone's forbearance petition. Accordingly, TracFone's petition for forbearance and its pending petitions for designation as an ETC should be promptly granted.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being filed electronically. If you have questions regarding this letter, please communicate directly with undersigned counsel for TracFone.

Respectfully submitted,



Mitchell F. Brecher

*Counsel for TracFone Wireless, Inc.*

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<sup>2</sup> USTelecom's suggestion that TracFone would need forbearance from Section 254(e) of the Act is incorrect. Unlike Section 214(e)(1)(A), Section 254(e) does not contain eligibility requirements for ETC designation. It requires that carriers who receive support use that support for the maintenance and upgrading of facilities and services for which the support is intended. Obviously, if a carrier has no facilities to provision, maintain or upgrade, its obligation would be to use the support it receives for the purpose of provisioning its services -- in TracFone's case, Lifeline service.

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cc: Ms. Michelle Carey  
Mr. Russell Hanser  
Mr. Scott Bergmann  
Ms. Jessica Rosenworcel  
Mr. Thomas Navin  
Mr. Ian Dillner  
Ms. Narda Jones  
Ms. Carol Pomponio  
Mr. Mark Seifert  
Ms. Pam Slipakoff  
Mr. Jeremy Marcus